



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
INSTALLATIONS, ENERGY AND ENVIRONMENT
110 ARMY PENTAGON
WASHINGTON DC 20310-0110

5 October 2020

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MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Adverse Effect and Termination of Consultation under the National Historic Preservation Act

1. References:

- a. National Historic Preservation Act (NHPA); Public Law 13-287; Title 54, U.S. Code, section 300101 et seq.
- b. Title 36, Code of Federal Regulations, Part 800 *Protection of Historic Properties* (36 CFR 800).
- c. Memorandum, SAIE-ZA, 26 Jul 2019, subject: Designation of the Department of the Army Federal Preservation Officer.
- d. Memorandum, DAIM-IS, 27 Dec 2016, subject: Army Historic Property Guidance
- e. Army Directive 2020-10, dated 25 Aug 2020, subject: Use of Imitative Substitute Building Materials in Historic Housing

2. This memorandum and enclosure define the requirement in Section 106 of the NHPA and its implementing regulation, 36 CFR 800, for adverse effect determinations and termination of consultation. It also establishes internal Army procedures and responsibilities for adverse effect determinations and termination of consultation, pursuant to reference 1.c. The *Army Procedures and Responsibilities for Adverse Effect Determinations and Termination of Consultation under the National Historic Preservation Act* are enclosed.

3. Where there is an adverse effect to a historic property resulting from a proposed Army undertaking, the consultation procedure in 36 CFR 800 results in either a Memorandum of Agreement (MOA) or, when further consultation will not be productive and agreement on a MOA cannot be reached, in termination of consultation and comment issued from the Advisory Council on Historic Preservation (ACHP) to the Secretary of the Army.

4. Each termination of consultation requires that the Secretary of the Army directly engage and take into account the ACHP's comments in reaching a final decision on the undertaking. The Secretary of the Army must also document the final Army decision

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regarding the undertaking and provide that documentation to the ACHP prior to approval of the undertaking (36 CFR 800.7(c)(4)). Pursuant to NHPA Section 110 (l), the Secretary of the Army cannot delegate this responsibility. Therefore, installations must submit a command endorsed request for termination of consultation to Headquarters Department of the Army for concurrence prior to terminating consultation.

5. This memorandum and its enclosure have been coordinated with the ACHP. Prior Army guidance in reference 1.d., pertaining to adverse effects, the resolution of adverse effects, and termination of consultation is superseded. This memorandum does not apply to historic properties addressed in Program Comments issued by the ACHP pursuant to 36 CFR 800.14(e).

6. Inquiries regarding this historic preservation policy may be directed to the undersigned at david.b.guldenzopf.civ@mail.mil.



David Guldenzopf, Ph.D.
Army Federal Preservation Officer

Enclosure

DISTRIBUTION:

Deputy Chief of Staff G-9
Commander, Army Materiel Command
Director, Army National Guard
Chief, Army Reserve

ENCLOSURE

Army Procedures and Responsibilities for Adverse Effect Determinations and Termination of Consultation under the National Historic Preservation Act ¹

1. **Adverse effect to historic properties.** The compliance process to address an adverse effect to a historic property is defined in NHPA Section 106 implementing regulation at 36 CFR 800, and is summarized in this enclosure with attention to Army-specific procedures and responsibilities.

a. **Historic Properties.** Historic properties are properties that are eligible for or listed in the National Register of Historic Places and are usually 50 years old or older. They include historic housing and other historic buildings and structures, archeological sites, landscapes, districts, objects, and properties of traditional religious or cultural importance to federally-recognized Indian tribes.

b. **Adverse Effect.** An adverse effect to a historic property occurs when an Army *undertaking* (an Army project or action) will cause unavoidable physical destruction or alteration of a historic property. An adverse effect to a historic property occurs in situations such as the proposed demolition of a historic building, or the planned destruction of an archeological site located in the footprint of new construction, or where the Secretary of the Interior's Standards for the Treatment of Historic Properties are not followed for historic building renovation.

c. **Historic Building Demolition Criteria.** Demolition of a historic building may be necessary if it is highly deteriorated, underutilized, vacant, if hazardous materials or unsafe conditions are present, or if maintaining the building is not financially or otherwise feasible. In such instances, a balanced priority should be applied that addresses historic preservation concerns in the context of the costs of rehabilitation or renovation, health and safety conditions, quality of life of building occupants, and other issues. Historic buildings should be considered for demolition only after prudent and reasonable alternatives to demolition have been considered and found to be financially or otherwise unfeasible. Historic buildings have likely reached the end of their intended useful life if their repair, rehabilitation, or renovation costs exceed the cost of demolition and replacement by similar new construction.

2. **Existing Programmatic Agreements (PA).** In cases where there is an existing NHPA PA in place, those PAs generally require that all proposed actions for the management of historic buildings follow the Secretary of the Interior's Standards for the Treatment of Historic Properties. When the installation proposes a project where the Secretary of the Interior's Standards will not be followed, or proposes demolition of a

¹ Refer to 36 CFR 800.16 for definitions of terms used herein.

historic building or the planned destruction of an archeological site, an adverse effect determination is made by the installation. At that point, the PAs do not further address adverse effects beyond the requirement that each adverse effect must be consulted on separately, under the individual project review procedures in 36 CFR 800.6. Once the adverse effect review under 36 CFR 800.6 is initiated, the terms of the PA do not apply, and a separate consultation and Memorandum of Agreement (MOA) development is required.

3. Resolution of Adverse Effects and Failure to Resolve Adverse Effects.

Whether a PA is in place or not, adverse effect actions are generally addressed by following the adverse effect consultation procedures in 36 CFR 800.6, to seek a MOA.

a. **Notification and Consultation.** The procedures in 36 CFR 800.6 require that the Army installation *agency official* (defined as the installation commander, or garrison commander, or their officially appointed designee), notify the Advisory Council on Historic Preservation (ACHP) regarding their adverse effect determination and:

- Consult with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), and possibly others including the ACHP (if the ACHP decides to participate) to develop and evaluate alternatives or modifications to the proposed action that could avoid, minimize, or mitigate the adverse effect.

- If the consulting parties agree to terms to avoid, minimize, or mitigate the adverse effect, those terms are stipulated in a MOA.

- Draft MOAs are provided by the installation to their command, the Deputy Chief of Staff G-9, and to the Army Federal Preservation Officer (FPO) in the Office of the Assistant Secretary of the Army for Installations, Energy and Environment for review prior to their execution. Installations must address and incorporate all review comments into the MOA.

- The Army FPO may engage in MOA consultation and consult on behalf of the Army as the Army agency official, as appropriate (memorandum reference 1.c.).

b. **Agreement on a MOA.** Where agreement is reached on a MOA:

- Signatories to the MOA. The Army installation agency official, the SHPO/THPO, and ACHP (if participating) are signatories to the MOA.

- Invited signatories. In accordance with the requirement in Army Directive 2020-10, any privatized housing partner holding title to historic Army housing shall be a signatory to all NHPA PAs and MOAs pertaining to that housing. The Army installation agency official may also invite additional parties to be signatories to the MOA. Invited signatories may include Indian Tribes or Native Hawaiian organizations, and should include any party that assumes a responsibility under the MOA. Refusal of an invited signatory to sign the MOA does not invalidate the MOA. Invited signatories have the same rights as the signatories to seek amendment or termination of the MOA.

- Concurrence by others. The Army installation agency official may

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invite a consulting party to sign the MOA as a concurring party. Refusal of any consulting party to concur in the MOA does not invalidate the MOA.

- The installation then provides the signed MOA to the ACHP along with certain documentation (specified in 36 CFR 800.11(f)), prior to implementing the undertaking.
- Once the ACHP receives the signed MOA and documentation, the installation may proceed with the undertaking following the terms of the MOA.

c. Failure to Resolve Adverse Effects. If there is a failure to resolve the adverse effects of an Army action and the installation agency official and the SHPO/THPO cannot agree on the terms of a MOA, the installation agency official must request the ACHP to join the consultation, and provide the ACHP with documentation as specified in 36 CFR 800.11(g).

- If the ACHP joins in the consultation, consultation proceeds with the ACHP, SHPO/THPO and other consulting parties. If agreement is reached, a MOA will be executed
- If the ACHP does not join the consultation, the ACHP will so notify the Army and will issue comments within 45 days under 36 CFR 800.7(c) to the Secretary of the Army. The procedure in item number 6. **“Secretary of the Army Response to ACHP Comment”** is then followed.

d. SHPO/THPO/ACHP Termination of Consultation. When further consultation will not be productive and a MOA to resolve adverse effects cannot be reached, the SHPO, THPO, or ACHP may terminate consultation.

- If SHPO terminates their consultation in writing, a MOA acceptable to the installation agency official and the ACHP may be executed without the SHPO’s involvement. The agency official and ACHP are signatories to that MOA.
- If a THPO terminates consultation regarding an Army action occurring on or effecting properties on tribal lands, ACHP will issue comments within 45 days under 36 CFR 800.7(c) to the Secretary of the Army. The procedure in item number 6. **“Secretary of the Army Response to ACHP Comment”** is then followed.
- If the ACHP terminates consultation, the ACHP will notify the installation agency official, the Army FPO, and all consulting parties of the termination, and provide comments to the Secretary of the Army within 45 days under 36 CFR 800.7(c). The procedure in item number 6. **“Secretary of the Army Response to ACHP Comment”** is then followed. The ACHP may consult with the Army FPO prior to their termination to seek to resolve the issues concerning the undertaking and its effects on historic properties.

4. Army Termination of Consultation, and Request for ACHP Comment. When further consultation will not be productive and a MOA to resolve adverse effects cannot be reached, the Army installation agency official may terminate NHPA Section 106 consultation by means of the following procedure:

a. **Termination of Consultation Request to Headquarters Department of the Army (HQDA).** Where termination of consultation is the only viable remaining course of action, the installation agency official will provide a memorandum requesting termination of consultation through the chain of command to the Army FPO. The termination request memorandum must indicate why further consultation is not likely to be productive, provide the reasons for terminating consultation, and request HQDA concurrence with termination of consultation. The termination request memorandum must be concurred with and endorsed at the command level by a General Officer (GO) or a member of the Senior Executive Service (SES).

b. **HQDA Review of Request for Termination of Consultation.** Upon receipt of a GO/SES command endorsed termination request memorandum, the Army FPO will coordinate the request with the Deputy Chief of Staff G-9, and other HQDA principal officials as appropriate, and document concurrence from the Assistant Secretary of the Army for Installations, Energy, and Environment. The Army FPO will provide the command and the installation agency official with documentation of the results of the HQDA review of the request to terminate consultation. The installation agency official is authorized to terminate consultation only upon receipt of HQDA concurrence. The Command level GO/SES endorsement and HQDA principal official concurrence is necessary because termination of consultation by the installation agency official requires the Secretary of the Army to directly engage and issue the final Army decision on the undertaking to the ACHP.

c. **Termination of Consultation Notification to Consulting Parties.** Upon receipt of HQDA concurrence with the request to terminate consultation, the installation agency official will notify the MOA consulting parties by signed memorandum that the Army is terminating consultation and will provide the reasons for termination. The installation agency official will furnish the Army FPO with a copy of the termination of consultation notification memorandum sent to MOA consulting parties.

d. **Request for ACHP Comments.** Following receipt of the installation agency official's termination of consultation notification memorandum sent to consulting parties, the Army FPO will request comments from the ACHP pursuant to 36 CFR 800.7(c), and will notify all MOA consulting parties of that request.

5. ACHP Comment Process.

a. **ACHP 45 Day Comment Period.** The ACHP must provide its comments within 45 days of the Army FPO's request. During its 45 day comment period and for the purposes of developing their comments, the ACHP will provide the Army and other consulting parties the opportunity to provide their views. The ACHP may request the

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Army provide additional existing information, assist in arranging an on-site inspection of the property, and an opportunity for public participation.

b. **ACHP Comment to Secretary of the Army.** The ACHP will transmit its comments by the end of the 45 day comment period to the Secretary of the Army, the installation agency official, the Army FPO, all consulting parties, and others as the ACHP deems appropriate.

6. **Secretary of the Army Response to ACHP Comment.** The Secretary of the Army will take the ACHP's comments into account and will provide the ACHP with a final decision regarding the undertaking. Pursuant to NHPA Section 110 (I), the Secretary of the Army cannot delegate this responsibility.

a. **Secretary of the Army Decision.** The Secretary of the Army's final decision document on the undertaking must include a summary of the rationale for the decision and evidence of consideration of the ACHP's comment prior to approval of the undertaking. The Army FPO will facilitate preparation of the Secretary of the Army's decision document. The installation agency official, command, and HQDA will provide the Army FPO with assistance and information during preparation of the Secretary of the Army's decision document. The Secretary of the Army's final decision on the undertaking is issued directly to the ACHP.

b. **Consulting Party Notification of Secretary of the Army Decision.** Once the Secretary of the Army's decision on the undertaking has been issued to the ACHP, the Army FPO will ensure that a copy of the Secretary of the Army's decision is provided to all MOA consulting parties.

7. **Public Notification and Proceed with the Undertaking.** After the Secretary of the Army decision is issue to the ACHP, the installation agency official must notify the public and make the record of the decision available for public inspection. The undertaking may proceed at the time the notification to the public occurs and the record is made available for public inspection. There is no further consultation, review or waiting period.